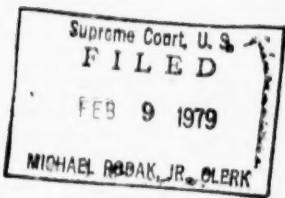


IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1978

NO. 78-

78 - 5944



ROOSEVELT GREEN, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR K. BOLTON  
Attorney General

ROBERT S. STUBBS, II  
Executive Assistant  
Attorney General

Please serve:

DARYL A. ROBINSON  
132 State Judicial Bldg.  
40 Capitol Square, S. W.  
Atlanta, Georgia 30334  
(404) 656-3349

DON A. LANGHAM  
First Assistant  
Attorney General

JOHN C. WALDEN  
Senior Assistant  
Attorney General

DARYL A. ROBINSON  
Assistant Attorney General

I N D E X

	<u>Page</u>
QUESTIONS PRESENTED . . . . .	1
STATEMENT OF THE CASE . . . . .	2
REASONS FOR NOT GRANTING THE WRIT	
I. THE TRIAL COURT'S REFUSAL TO ALLOW INTO EVIDENCE CERTAIN TESTIMONY, OSTENSIBLY IN MITIGATION, WHEN THE TESTIMONY PROFFERED WAS PLAINLY HEARSAY AND INADMISSIBLE UNDER GEORGIA RULES OF EVIDENCE, DID NOT VIOLATE ANY RECOGNIZED FEDERAL CONSTITUTIONAL RIGHT . . . . .	3
CONCLUSION . . . . .	6
CERTIFICATE OF SERVICE . . . . .	7

TABLE OF AUTHORITIES

Cases Cited:

	<u>Page</u>
<u>Green v. State</u> , 115 Ga. App. 685, 155 S.E.2d 655 (1967) . . . . .	3
<u>Green v. State</u> , 242 Ga. 261, __ S.E.2d __ (1978) . . .	2, 4
<u>Little v. Stynchcombe</u> , 227 Ga. 311(2), 180 S.E.2d 541 (1971) . . . . .	3
<u>Lockett v. Ohio</u> , __ U.S.__, 98 Sup. Ct., 57 L.Ed.2d 973 (1978) . . . . .	4
<u>Moore v. Georgia</u> , __ U.S.__, 58 L.Ed.2d 249 (1978) (No. 78-5159) . . . . .	2
<u>Moore V. State</u> , 240 Ga. 807, __ S.E.2d__ (1978) . . .	2
<u>Somers v. State</u> , 116 Ga. 535, 42 S.E. 779 (1902) . . .	3

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1978

NO. 78-

ROOSEVELT GREEN, JR.,  
Petitioner,  
v.  
STATE OF GEORGIA,  
Respondent.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

I.

Did the trial court's refusal to allow into evidence certain testimony, ostensibly in mitigation, when the testimony proffered was plainly hearsay and inadmissible under Georgia rules of evidence, violate any recognized federal constitutional right?

STATEMENT OF THE CASE

Roosevelt Green was convicted in Monroe County, Georgia, Superior Court for the December 12, 1976, murder of Teresa Carol Allen. On January 28, 1978, Green was sentenced to death.

Green's companion in the murder, Carzell Moore, was previously tried, convicted and sentenced to death. Moore's conviction and sentence were affirmed by the Supreme Court of Georgia. Moore v. State, 240 Ga. 807, \_\_\_ S.E.2d \_\_\_ (1978). This Court denied Moore's petition for writ of certiorari to the Supreme Court of Georgia. Moore v. Georgia, \_\_\_ U.S. \_\_\_, 58 L.Ed.2d 249 (1978) (No. 78-5159).

Green's conviction and sentence were affirmed by the Supreme Court of Georgia in Green v. State, 242 Ga. 261, \_\_\_ S.E.2d \_\_\_ (1978).

Additional facts will be recounted in the remaining portion of this brief if necessary to address adequately any issue raised in the petition for writ of certiorari.

REASONS FOR NOT GRANTING THE WRIT

I. THE TRIAL COURT'S REFUSAL TO ALLOW INTO EVIDENCE CERTAIN TESTIMONY, OSTENSIBLY IN MITIGATION, WHEN THE TESTIMONY PROFFERED WAS PLAINLY HEARSAY AND INADMISSIBLE UNDER GEORGIA RULES OF EVIDENCE, DID NOT VIOLATE ANY RECOGNIZED FEDERAL CONSTITUTIONAL RIGHT.

The sole issue presented by Petitioner as a reason for granting the writ is the refusal of the trial court to allow Petitioner to present testimony of a witness in mitigation even though it is clear under Georgia law that the testimony sought was inadmissible hearsay. The witness, Thomas Pasby, according to Petitioner, would testify that Carzell Moore had admitted shooting the victim.<sup>1/</sup>

In the present case, Green sought to introduce inadmissible hearsay into evidence during the penalty phase of his trial. Upon the State's objection, the trial court excluded the testimony. The issue was raised on direct appeal to the Supreme Court of Georgia, which upheld the action of the trial court.

Quoting from Little v. Stynchcombe, 227 Ga. 311(2), 180 S.E.2d 541 (1971), the court held: "Code § 38-301 provides: 'Hearsay evidence is that which does not derive its value solely from the credit of the witness, but rests mainly on the veracity and the competency of other persons. The very nature of the evidence shows its weakness, and it is admitted only in specified cases from necessity.' Furthermore, 'Declarations by another person to the

effect that he, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused upon his trial.'" Green v. State, 242 Ga. 261, 271 \_\_\_ S.E.2d \_\_\_ (1978) (citations omitted). The court further found that the testimony sought to be admitted fit under no exception to the hearsay evidence rule recognized in Georgia. Id. at 271-72.

In Lockett v. Ohio, \_\_\_ U.S. \_\_\_, 98 Sup. Ct. \_\_\_, 57 L.Ed.2d 973 (1978), this Court recognized the need for "individualized consideration" in capital cases. However, such individualized consideration does not require suspension of the rules of evidence, the purpose of which is to insure that the jury receive and consider only competent evidence. Under the State rules of evidence, the testimony sought to be introduced by Petitioner was clearly inadmissible hearsay and plainly not competent evidence.

Further, the Supreme Court of Georgia noted that ". . . some authorities do recognize as a mitigating circumstance that 'a defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor constitutes a mitigating circumstance.'" Green, supra, 242 Ga. 272.<sup>2/</sup> But as the Supreme Court of Georgia found, "The defendant's participation during the course of the criminal enterprise in leaving his kidnap victim with his armed accomplice on a lonely road while he went for gas could not on any reasonable basis be termed minor participation." Id. at 272-73.

Finally, after having considered the brutal facts of the kidnap, rape and murder of Teresa Carol Allen and Green's part in it, the court stated: "While we do not hold that there would never be

<sup>1/</sup> Such testimony was not excludable as hearsay at Moore's trial. Ga. Code § 38-414; Somers v. State, 116 Ga. 535, 42 S.E. 779 (1902); Green v. State, 115 Ga. App. 685, 155 S.E.2d 655 (1967).

<sup>2/</sup> See, e.g., Lockett v. Ohio, supra, 57 L.Ed.2d at 992

a case in which the declaration against interest exception to the hearsay rule should be extended to declarations against penal interests, the facts of the appellant's case do not justify such an extension." Id. at 273.

Therefore, because the testimony which Petitioner sought to introduce at the penalty phase of his trial was inadmissible hearsay under Georgia rules of evidence and found to be so by the Supreme Court of Georgia, no federal constitutional question has been presented which merits review by this Court.

CONCLUSION

This Court should refuse to grant the writ of certiorari because no sufficient reason for review has been set forth by Petitioner.

Respectfully submitted,

ARTHUR K. BOLTON  
Attorney General

ROBERT S. STUBBS, II  
Executive Assistant  
Attorney General

*Don A. Langham*  
DON A. LANGHAM  
First Assistant  
Attorney General

*John C. Walden*  
JOHN C. WALDEN  
Senior Assistant  
Attorney General

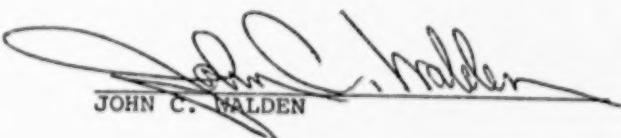
*Daryl A. Robinson*  
DARYL A. ROBINSON  
Assistant Attorney General

CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent,  
and a member of the Bar of the Supreme Court of the United States,  
certify that in accordance with the rules of the Supreme Court of  
the United States, I have this day served a true and correct  
copy of this Brief for Respondent in Opposition upon the  
Petitioner's attorney by depositing a copy of this Brief in  
the United States mail, with proper address and adequate postage  
to:

Mr. Richard Milam  
Attorney for the Petitioner  
Garland & Milam, P.C.  
300 West Third Street  
Jackson, Georgia 30233

This 6<sup>th</sup> day of February, 1979.



JOHN C. WALDEN